No. 15210

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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RENNIE & LAUGHLIN, INC., a Corporation,
*Appellant,*

*vs.*

CHRYSLER CORPORATION, a Corporation,
*Appellee.*

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## APPELLEE'S BRIEF.

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## APPELLEE'S BRIEF.

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### Designation of Parties.

In this brief the parties will be referred to as they appeared in the District Court. Appellant was plaintiff below and appellee was defendant.

### Jurisdiction.

Defendant accepts plaintiff's statement of the pleadings and facts disclosing that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment in question.

### Statement of the Case.

Plaintiff has divided its statement of the case into two parts: (1) the procedural history, entitled "Statement of Case", and (2) a summary of the allegations of the amended complaint, entitled "The Amended Complaint". Defendant accepts plaintiff's statement of the procedural history of the case, except it should be pointed out that the

order appealed from dismissed both the amended complaint and the action. Although defendant does not controvert plaintiff's summary of the amended complaint, defendant is of the view that it is incomplete in that it does not contain all of the allegations which are pertinent in supporting defendant's position that the amended complaint fails to state a claim upon which relief can be granted. Defendant summarizes immediately below those allegations of the amended complaint which it deems necessary to a proper understanding and disposition of the appeal.

All references are to the amended complaint at pages 61 through 67 of the Record and to Exhibits A and B attached to the amended complaint. Exhibit A is at pages 9 to 33 of the Record, and Exhibit B is at pages 33 to 53 of the Record.

In December, 1949, plaintiff and the De Soto Division of defendant entered into a written agreement whereby plaintiff acquired a non-exclusive right to purchase De Soto and Plymouth motor vehicles. (Paragraph III and Exhibit A.) The agreement, Exhibit A, provided that "this agreement shall terminate immediately by its own force without notice from either party in the event of . . . an attempted assignment of this agreement by Direct Dealer without De Soto's written consent". (Paragraph 7 of Exhibit A.) Plaintiff, for a number of reasons, "advised Defendant . . . of its desire to sell its business." (Paragraphs VII and VIII.) Defendant advised plaintiff that it would secure a buyer for plaintiff that was "acceptable" to defendant. (Paragraph VIII.) Thereafter, certain prospective buyers were referred by defendant to plaintiff. (Paragraph IX.) Plaintiff and said prospective buyers reached an oral understanding on the sale of "Plaintiff's business," and arrangements

were made to execute a "formal contract of sale". (Paragraph X.) Before a formal contract of sale was executed, defendant informed said prospective buyers that defendant "had revoked its consent to the sale". (Paragraph XI.) Also before a formal contract of sale was executed, defendant told plaintiff that defendant "had decided to revoke its consent in order to decrease the number of dealers in the area". (Paragraph XII.) The prospective purchasers refused to complete the sale after notification by defendant that it had revoked its consent. (Paragraph XI.) Plaintiff then entered into a management contract with the prospective purchasers whereby plaintiff turned over to them its entire business on a management basis. (Paragraph XIV.)

Subsequently, in 1952, plaintiff and defendant executed another written agreement under which or by which plaintiff continued to act as an automobile dealer for the De Soto Division of defendant. (Paragraph VI and Exhibit B.) Said 1952 agreement superseded and cancelled the 1949 agreement. (Paragraph 29 of Exhibit B.) The 1952 agreement provided that "Direct Dealer may not assign this agreement without the written consent of De Soto, executed by the President, Vice-President or General Sales Manager of De Soto." (Paragraph 29 of Exhibit B.) The 1952 agreement also provided that the agreement terminated "upon an attempted assignment of this agreement by Direct Dealer". (Paragraph 8 of Exhibit B.)

Plaintiff's losses continued during the management period and plaintiff closed its "business" and "discontinued operating as a direct dealer for Defendant" on March 31, 1954. (Paragraphs XV and XVIII.) Plaintiff was damaged in that it did not receive the price for the sale of its business to the prospective purchasers (Paragraph

XVII); it sustained additional operating losses after the revocation of consent to the proposed assignment (Paragraph XVIII); and its reputation was irreparably damaged by reason of defendant's refusal to permit the "sale of said business of Plaintiff" (Paragraph XIX).

## Summary of Argument.

The District Court properly made an order dismissing the amended complaint and the action and this Court should affirm that order for the reason that the amended complaint fails to state a claim upon which relief can be granted. Defendant's argument on this appeal is based upon the following points:

I.

The Amended Complaint and the Action Were Properly Dismissed Under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II.

The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1949 Agreement (Exhibit A to the Amended Complaint).

III.

The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1952 Agreement (Exhibit B to the Amended Complaint).

IV.

Plaintiff's Argument on This Appeal Basically Is an Attempt to Invoke the Principle of Promissory Estoppel, Which Can Not Be Applied to the Facts Pleaded by Plaintiff.

V.

The Defects in the Amended Complaint Could Not Be Cured by Pleading Additional Facts.

## I.

## The Amended Complaint and the Action Were Properly Dismissed Under F. R. C. P. 12(b)(6).

This case is one of those situations for which Rule 12(b)(6) of the Federal Rules of Civil Procedure is designed. An examination of the amended complaint can leave no doubt that plaintiff has failed to state a claim upon which relief can be granted, and that plaintiff cannot allege a breach of a contractual obligation by defendant.

The rule is clear that, where a complaint is without any merit and where the plaintiff could not possibly prove a case under the allegations of the complaint, the defendant should be protected by an early dismissal of the action rather than being put to the trouble and expense of answering a fatally defective complaint.

See,

*De Loach v. Crowley's, Inc.* (C.C.A. 5th 1942), 128 F. 2d 378, 380;

2 Moore's Federal Practice.

1208, and 1955 Cumulative Supplement thereto, commencing at page 150.

## II.

## The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1949 Agreement (Exhibit A to the Amended Complaint).

It is defendant's primary position that plaintiff has not alleged the breach by defendant of any enforceable contractual obligation. The allegation in Paragraph XIII of the amended complaint respecting the 1949 agreement does not constitute a sufficient allegation. It alleges only:

> "That having consented to the aforesaid sale to said purchasers, Defendant's subsequent revocation of said consent constituted a breach of said sales contract annexed hereto as Exhibit A." (Paragraph XIII; R. 64.)

That allegation is a conclusion of law; it is not admitted by a motion to dismiss for failure to state a claim. Such a motion admits only allegations of fact which are material and relevant; it does not admit arguments, inferences or legal conclusions.

> *Flanigan v. Security-First Nat. Bank* (D.C., S.D. Cal., 1941), 41 F. Supp. 77, 79;
>
> *Huntley v. Gunn Furniture Co.* (D.C., W.D. Mich., 1948), 79 F. Supp. 110, 111.

Plaintiff has pleaded the 1949 contract between the parties by attaching a copy as Exhibit A to the amended complaint. Accordingly, it is a part of the amended complaint for all purposes. (Rule 10[c], Federal Rules of Civil Procedure.) Therefore, the rule stated in

*Zeligson v. Hartman-Blair, Inc.* (C.C.A. 10th, 1942), 126 F. 2d 595,

is particularly applicable:

> "The motion to dismiss admitted all facts well pleaded, but it did not admit the legal effect ascribed by the pleader to the writing. The writing was attached to the first amended complaint as an exhibit and its legal effect is to be determined by its terms rather than by the allegations of the pleader." (Page 597.)

And, in

*Johnson v. Igleheart Bros.* (C.C.A. 7th, 1938), 95 F. 2d 4,

the defendant demurred to a complaint for breach of contract. The court affirmed a judgment sustaining the demurrer, saying:

> "Concerning the effect of the demurrer, it seems to be the position of plaintiff that the defendant, by making such attack upon the complaint, admits the allegations thereof, or at any rate, such allegations as are well pleaded. Generally, of course, that is the case, but it seems where an action is based upon a written contract, a copy of which is attached to the complaint, a somewhat different effect is had, or perhaps it would be more accurate to say that the court must look to the contract in determining what allegations of the complaint are properly pleaded." (Page 7.)

To the same effect see:

*St. Louis, K. & S. E. R. Co. v. United States,* 267 U. S. 346, 45 S. Ct. 245 (1925).

Plaintiff consistently has characterized this action as one for damages for breach of contract. But nowhere

in the amended complaint has plaintiff specified with any particularity the contractual obligation which it is claimed defendant breached. To prevail on the amended complaint, plaintiff must well plead the breach of an agreement which placed upon defendant a binding obligation to consent affirmatively to an assignment by plaintiff of its rights under the agreement. Plaintiff did not do this.

It is appropriate at this point to dissipate the confusion which is inherent in plaintiff's misleading reference in the amended complaint to a sale of "its business", rather than to a sale by way of an assignment of rights arising out of a written contract. It is the latter limited type of property right which, under the facts alleged, is involved. The ownership and management of plaintiff's other property was not affected by any agreement. There is nothing in the 1949 agreement which prevented plaintiff from selling its other assets at any time, for any price it chose, or to whomsoever it pleased, whether or not defendant consented to such a sale.

The 1949 agreement is free from all ambiguity upon the basic question whether defendant was obligated under any circumstances to consent affirmatively to an assignment of the contract by plaintiff. There is nothing in that agreement which placed such an obligation upon defendant. On the contrary, the existence of such an obligation was emphatically denied by the term therein providing that any attempted assignment by plaintiff without defendant's written consent terminated the agreement. (Paragraph 7; R. 19.) Such a provision is the very antithesis of the right now claimed by plaintiff. It created a duty in plaintiff not to assign without defendant's written consent, and it created a right in defendant to give or to withhold consent to a proposed assignment.

Plaintiff itself seems to concede this fact by admitting, on page 5 of its opening brief, that "Chrysler, of course, was under no duty to consent to appellant's proposed assignment . . ."

Defendant is, however, somewhat puzzled by the paragraph on page 5 of plaintiff's brief which contains the statement that defendant "impliedly promised that it would do nothing to prevent appellant's making the assignment . . ." Manifestly plaintiff cannot properly maintain that the 1949 agreement contained any such implied promise or condition. Such a promise flies in the teeth of paragraph 7 of that agreement. It requires no citation of authority for the axiomatic principle that conditions and promises may not be read into a contract by implication when to do so is inconsistent with the express provisions contained in the agreement. The cases cited by plaintiff,

> *Baldwin Rubber Co. v. Paine & Williams Co.,* (C.C.A. 6th, 1939), 107 F. 2d 350,

and

> *Sacramento Navigation Company v. Salz,* 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927),

are entirely consistent with this position in that in both cases the courts recognized that conditions and promises could be implied only for the purpose of effectuating the intention of the parties as it appears from the language of the contract and the circumstances under which it was made.

Nor can plaintiff rely on those allegations upon which plaintiff bases its conclusion of "waiver" to support a claim that it has adequately alleged the breach of an enforceable promise by defendant.

The short and basic answer to plaintiff's tender of waiver as a theory for recovery is that waiver may not be invoked to create an enforceable obligation where none existed before. It is "defensive" in nature. The doctrine is limited to defeating a cause of action or to eliminating a defensive claim interposed by a defendant.

Professor Williston makes this extremely pertinent statement concerning waiver:

> "The law is clear that in any case where a party to a contract agrees to give up a possible further defense or foregoes the advantage of a condition provided for his benefit in an existing contract, the promise is binding if the promisee relying thereon changes his position. In these cases, however, no new right is created. The court does not sustain an action on the promise; it reaches the desired result by allowing a defense to an action or allowing an original right to be enforced by merely prohibiting the interposition of a defense. They properly fall under the head of waiver, giving that word the narrow significance hereafter ascribed to it."
>
> (I Williston on Contracts, [1936 Rev. Ed.], §139, pp. 497-498.)

Professor Williston expressly recognizes that the doctrine of waiver is firmly rooted in estoppel.

> III Williston on Contracts, *supra*, §691, p. 1995, §692, p. 1995.

The editors of California Jurisprudence, 2d, in a statement concerning the objective of estoppel make it clear that Professor Williston's comments pertaining to waiver are merely an application of the principles of estoppel:

> "The object of the doctrine [of estoppel] is protective, and it is limited to saving harmless or making

> whole the person in whose favor it arises. . . . Estoppel is applied defensively, and operates to prevent a person from taking unfair advantage of another, not to give an unfair advantage. It is always so applied as to promote the ends of justice, being available only for protection, not as a weapon of assault; and in the nature of things its application depends on the particular facts of each case." (18 Cal. Jur. 2d, Estoppel, §3, p. 405.)

In this case, therefore, waiver might be a proper issue if (1) there had been an assignment of plaintiff's rights under the agreement prior to withdrawal of the consent to assignment, (2) the assignee had brought this action for some breach of the 1949 agreement, and (3) defendant had interposed the defense that the assignee could not maintain the action in that there was no valid assignment because no written consent had been obtained from defendant. Such assignee might then claim that defendant had waived that condition of the agreement. Manifestly that situation bears no resemblance to the case before this court. This action was not brought by any assignee.

All of the cases cited by plaintiff in support of its theory of waiver in part (a) of its Point I are consistent with this analysis of waiver. In

> *Gilmore v. Hoffman,* 123 Cal. App. 2d 313, 266 Pac. 2d 833 (1954);
>
> *Daly v. Ruddell,* 137 Cal. 671, 70 Pac. 784 (1902); and
>
> *Continental Casualty Co. v. Schaefer* (C. A. 9th, 1949), 173 F. 2d 5,

the courts invoked the principle of waiver only for the limited purpose of disposing of a defense asserted by the

defendant. In none did the court use the doctrine as a basis for constructing an obligation as to which plaintiff was permitted to recover damages for the breach thereof.

The case of

*Power Service Corporation v. Joslin* (C.A. 9th, 1949), 175 F. 2d 698,

is of even less comfort or assistance to plaintiff for there the court applied the doctrine of waiver so as to defeat plaintiff's theory of recovery.

III.

**The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1952 Agreement (Exhibit B to the Amended Complaint).**

The 1952 agreement, Exhibit B to the amended complaint, has no proper place in this action. The sole reference to it in the amended complaint is the allegation in Paragraph VI that it was executed on February 20, 1952. (R. 62.) Plaintiff makes no mention of the agreement in its brief. Plaintiff's failure to refer to this agreement no doubt is forced upon it by the fact that it was not executed until several months after the occurrence of the events upon which plaintiff now seeks to predicate a cause of action for breach of contract.

## IV.

## Plaintiff's Argument on This Appeal Basically Is an Attempt to Invoke the Principle of Promissory Estoppel, Which Cannot Be Applied to the Facts Pleaded by Plaintiff.

Plaintiff's attempt to raise the question of waiver appears to be a misdirected effort to invoke the principle of promissory estoppel. Plaintiff, in its brief, appears to rely upon some implied promise that defendant promised to give written consent to the assignment, or that defendant promised not to do anything "to prevent appellant's making the assignment". But plaintiff has failed to allege facts showing that there was any consideration for such a promise. The amended complaint fails even to show a reasonable basis for invoking the principle of promissory estoppel. Those facts which are alleged affirmatively disclose that there was no consideration for any such promise, either conventional or arising from the application of promissory estoppel.

Section 90 of the Restatement of Contracts succinctly sets forth the promissory estoppel theory of consideration:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee *and which does induce such action or forbearance* is binding if injustice can be avoided only by enforcement of the promise." (Italics added.)

Promissory estoppel, of course, springs from the equitable estoppel doctrine which is appropriately stated by the following language quoted with approval in

*Carpy v. Dowdell,* 115 Cal. 677, 687, 47 Pac. 695 (1897),

and

*Wade v. Markwell & Co.,* 118 Cal. App. 2d 410, 420, 258 Pac. 2d 497 (1953):

> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." (115 Cal. at p. 687, 47 Pac. at p. 697; 118 Cal. App. 2d at p. 420, 258 Pac. 2d at p. 502.)

The amended complaint discloses affirmatively and quite clearly that plaintiff did not rely upon any promise of defendants and that plaintiff did not incur any detriment by reason of any such reliance. There can be no dissent from the statement that no promise on the part of defendant induced any action on the part of plaintiff which was of such a definite and substantial character as to require enforcement of the promise. The plain fact, alleged in the amended complaint, is that plaintiff did nothing in reliance upon any promise or representation made by defendant. At the time that consent was withdrawn plaintiff had not changed its position in any material respect whatsoever. Indeed, if plaintiff, in the face of notice of withdrawal of consent, had gone ahead and assigned the contract, it could not now claim that such

action was either justifiable or in reliance upon the original oral consent.

There is a further reason why plaintiff could not justifiably have relied upon any alleged oral promise to give written consent or to avoid doing anything to prevent plaintiff from making the assignment. It is this: Plaintiff alleges that a regional manager of defendant, one A. H. Langridge, gave the oral consent to the proposed assignment. The 1949 agreement, Exhibit A to the amended complaint, provides:

> "No representative of either party except as herein explicitly provided has any authority to waive any of the provisions of this agreement or to modify or change any of its terms . . ." (Paragraph 12 of Exhibit A; R. 25.)

That agreement does not provide "explicitly" or otherwise that either A. H. Langridge or a regional manager had authority to waive, modify or change the requirement of written consent to an asignment by plaintiff of its rights under the agreement. Plaintiff, therefore, was upon clear notice that any purported oral consent by the said A. H. Langridge would be ineffectual as a promise to give written consent or as a promise to avoid doing anything to prevent plaintiff from making the assignment. Any reliance, which, as stated, did not occur, upon the representations of the said A. H. Langridge, would have been entirely without justification.

## V.

## The Defects in the Amended Complaint Could Not Be Cured by Pleading Additional Facts.

Although plaintiff has divided its argument into two major "points," it is readily apparent that each point is addressed to the same claimed error. The only new thought introduced in plaintiff's "Point II" is the statement that it could have pleaded "many more facts." Plaintiff could not, however, consistent with the allegations in the amended complaint, have pleaded any additional facts which would show the breach of an obligation to permit the proposed asignment or to give written consent thereto. In all events plaintiff would remain confronted with the two obstacles previously discussed: (1) any such promise is in direct and irreconcilable conflict with the provisions of the 1949 agreement, and (2) any such promise is not supported by consideration, whether on the theory of promissory estoppel or otherwise.

## VI.

## Conclusion.

Plaintiff has not pleaded the breach of any contractual obligation imposed on defendant by the 1949 agreement, or the 1952 agreement, or otherwise. It has not alleged a promise which defendant was bound to perform and which it did not perform to plaintiff's damage.

The doctrine of waiver upon which plaintiff appears to base its argument is completely inapplicable here because that doctrine is never applied to create an enforceable contractual right. It is defensive only, operating to defeat a *prima facie* case made by a plaintiff, or to set aside a defense interposed by a defendant, thus clearing the way for a plaintiff to proceed upon his basic cause of action.

Plaintiff has not pleaded facts which bring the case within the principle of promissory estoppel. On the contrary, plaintiff's allegations disclose affirmatively that the principle cannot be used by plaintiff since the plaintiff did not rely or act to its detriment upon any representation or promise made by defendant.

In summary, plaintiff has not pleaded and cannot plead a cause of action for breach of any contract pleaded in the amended complaint. The amended complaint fails completely to state a claim upon which relief can be granted and discloses affirmatively that plaintiff has no claim. The District Court, therefore, properly made an order dismissing the amended complaint and the action, and this Court should affirm that judgment.

Respectfully submitted,

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Date: December 14, 1956.